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6 BEFORE THE  
7 CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD  
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9 In the Matter of:

10 WAYNE FISHBACK,  
11

12 Appellant,

13 vs.

14 VENTURA COUNTY ENVIRONMENTAL

15 HEALTH DIVISION, Local Enforcement

16 Agency,

17 Respondent.  
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APPEAL OF DECISION BY VENTURA  
COUNTY HEARING OFFICER  
AFFIRMING CEASE AND DESIST  
ORDER ISSUED MAY 11, 2006 BY  
VENTURA COUNTY ENVIRONMENTAL  
HEALTH DIVISION AS THE LOCAL  
ENFORCEMENT AGENCY

**DECISION**

21 This matter came on regularly for hearing before the California Integrated Waste Management  
22 Board ("CIWMB") on January 9, 2007 at 2:00 pm. Appellant Wayne Fishback ("Fishback") was  
23 represented by Kate Neiswender, attorney at law. The Ventura County Environmental Health  
24 Division, Local Enforcement Agency ("LEA"), was represented by Robert Kwong, attorney at  
25 law. The CIWMB staff was represented by Michael Bledsoe, attorney at law.  
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1 This hearing was held before the CIWMB Board Members ("Board Members") to consider  
2 Fishback's appeal filed of a decision by the Ventura County Hearing Officer affirming a Cease  
3 and Desist Order issued on May 11, 2006 by the Ventura County Environmental Health Division  
4 as the Local Enforcement Agency. (Public Resources Code (PRC) section 45030 et seq.).  
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7 The Board Members, having considered the arguments of legal counsel; statement of witnesses;  
8 the Administrative Record; and for good cause appearing, made the following determination:  
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#### 10 **Overall Statement of Decision**

11 The appeal of Fishback is denied and the both the Hearing Officer's Decision and the LEA's  
12 Cease and Desist Order are upheld.  
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15 For the reasons noted below, there is substantial evidence in the record that the LEA properly  
16 issued the Cease and Desist Order based upon the applicable regulations and the facts before the  
17 LEA when the Order was issued on May 11, 2006.  
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19 This determination does not mean that the Board Members have determined that Fishback's  
20 activity is a solid waste facility or necessarily requires a solid waste facility permit. It means that  
21 at the time the Cease and Desist Order was issued, Fishback had not provided the LEA with  
22 information to show that his activity was either exempt from the requirements of the applicable  
23 regulations, or that it fit within a regulatory tier that did not require a solid waste facility permit.  
24 Nothing in this decision precludes Fishback from complying with the Cease and Desist Order by  
25 providing evidence to the LEA's satisfaction that his activity is in compliance with the applicable  
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1 regulations at a level that would not require a solid waste facility permit (i.e. the excluded or  
2 Enforcement Agency Notification Tier).

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4 The Board Members want to encourage the appropriate re-use and recycling of waste-derived  
5 materials, but those activities must occur in compliance with applicable standards and/or through  
6 submission of documentation that is required by applicable regulations. These standards and  
7 requirements are necessary to provide an objective method for determining the appropriate and  
8 applicable level of regulatory oversight for an activity.  
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#### 10 11 **Evidentiary Matters**

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13 Prior to the hearing, the parties stipulated to the following:

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15 “In this case, the parties have agreed that the Board will consider the appeal solely on the basis  
16 of the administrative record before the Ventura County Hearing Officer (the “Record”). Neither  
17 party will be permitted to introduce new evidence in the hearing. Your arguments must speak  
18 only to evidence already in the Record and to how applicable law applies to that evidence. The  
19 Board’s decision will be based solely on evidence in the Record and on legal arguments made at  
20 the hearing.” (Letter from Elliot Block, Acting Chief Counsel, to the parties, dated November 9,  
21 2006).  
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24 At the hearing, Fishback introduced two documents and testimony for which both opposing  
25 counsels raised objections. Conversely, Fishback’s counsel objected that she had never stipulated  
26 to not being allowed to introduce new evidence at the hearing. The Board Chair noted the  
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1 objections for the record and then accepted the documents and heard the testimony subject to a  
2 later determination on whether or not to accept and consider the evidence.

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4 In making its decision on the appeal, the Board decided to sustain the objections to this evidence  
5 and did not consider it in making its decision for the following reasons:  
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8 The stipulation between the parties regarding the preclusion of introducing new evidence at the  
9 hearing is unambiguous and was memorialized in a letter from the CIWMB's Acting Chief  
10 Counsel to the parties a full two months before the hearing. The LEA's and the CIWMB staff's  
11 counsels relied upon that stipulation in preparing for the hearing. Other than Fiskback's  
12 counsel's assertion that she did not stipulate to this, there was no showing offered to prove that  
13 such a stipulation was not made, nor was there any written objection to the letter of November  
14 9th ever provided after it was received.  
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17 The Board Members would also like to note that this new evidence would not have been relevant  
18 even if admitted since it related to activities that occurred after the issuance of the Cease and  
19 Desist Order.  
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22 The testimony of John Conaway and George Eowan was to their opinion of the value of  
23 Fishback's activities based upon their review subsequent to the issuance of the Cease and Desist  
24 Order. The letter from Coastal Geology and Soil Inc, dated January 8, 2007 describes  
25 engineering work done subsequent to the issuance of the Cease and Desist Order. The letter from  
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1 Hanks and Associates, dated January 8, 2007, expressly states that "We cannot speak to the  
2 requirements for a Type A disposal facility since we have not done one."

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4 None of this new information is relevant to whether or not the LEA was correct in issuing the  
5 Cease and Desist Order at the time it did so. It might only be relevant to whether or not that  
6 activity had come into compliance with some aspect of the regulations or the Order at a later  
7 time. This latter point was not part of this appeal.  
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10 As provided by PRC 45032, in part, "the evidence before the Board [Members] shall consist of  
11 ... relevant evidence that, in the judgment of the Board [Members], should be considered to  
12 effectuate and implement the policies of this division." It is the Board Members's determination  
13 that even had the parties not stipulated as noted above, potential evidence of compliance after  
14 issuance of an Order is not relevant to whether or not the Order was properly issued in the first  
15 place.  
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### 17 18 **Findings of Fact and Conclusions of Law**

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20 1. The CIWMB's Construction, Demolition and Inert Debris Disposal regulations ("CDI  
21 Disposal regulations") provide a comprehensive set of regulations setting forth minimum  
22 standards and permitting requirements for the disposal or final deposition to land of construction,  
23 demolition and inert debris ("CDI debris"). These regulations were necessary because the  
24 Integrated Waste Management Act ("Act"), PRC 40000 et seq., expressly includes this material  
25 within the definition of solid waste (PRC 40191).  
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1 2. In adopting these regulations, Title 14 California Code of Regulations (14 CCR) section 17387  
2 et seq., the CIWMB balanced the need to protect the public health and safety and the  
3 environment through establishing regulatory standards for the handling of this material and the  
4 need to promote the reuse and recycling of these materials where they were not simply being  
5 disposed. Thus, the regulations set forth various levels of regulation depending upon the nature  
6 of the material, how the material is being handled, and what is being done with it.  
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9 3. The regulations distinguish between different types of CDI debris (14 CCR 17388) for the  
10 purposes of setting forth different levels of regulatory oversight.  
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13 4. In certain situations, the use of CDI Debris could be excluded from regulatory oversight  
14 because the circumstances clearly show that the debris is not being disposed (14 CCR 17388.2).  
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16 5. In other situations, where the use of CDI Debris was not as obviously non-disposal, activities  
17 could still be subject to a lesser level of oversight, and would not require a solid waste facility  
18 permit (or be considered a solid waste facility), where the user of the CDI Debris could provide  
19 evidence to indicate that the material was not being disposed through an "Operation Plan"  
20 showing that this use was a thought out, planned use of the CDI debris (14 CCR 17388.3 and  
21 17390).  
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24 6. This latter level of regulatory requirements is necessary because without a requirement of  
25 some reliable factual showing and documentation, an LEA would have no method to determine  
26 whether or not the activity was actually disposal site or not. (This is a fairly common regulatory  
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1 framework. Many state and local agencies require a showing of some type for an activity to  
2 qualify for exemptions from their requirements).

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4 7. If the requirements of PRC 17388.3 or 17388.3 can not be met, the activity would require a  
5 solid waste facility permit of some type, depending upon the type of CDI Debris being used  
6 (PRC 17388.4 and 17388.5).  
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9 8. For the period of time in question, Fishback brought dirt, stucco, brick, fully cured concrete,  
10 asphalt, and other materials and placed them on the ground at the property in question. These  
11 materials came from various construction and demolition sites and constitute Type A inert debris  
12 under 14 CCR 17388(k)(1). They also constitute solid waste under PRC 40191.  
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15 9. After an inspection and questioning by the LEA about this activity, Fishback did not provide  
16 factual information or documentation to indicate that this activity fell with either the Excluded  
17 tier (14 CCR 17388.2) or the Enforcement Agency Notification tier (14 CCR 17388.3) of the  
18 applicable regulations.  
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21 10. At that time, based upon its inspection of the property, and Fishback's failure to provide  
22 information to indicate that his activity did not constitute a solid waste facility that would require  
23 a solid waste facility permit, the LEA issued the Cease and Desist Order that is the subject of this  
24 appeal.  
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1 11. The Board Members did not find any substantial evidence in the administrative record to  
2 contradict the facts noted above or bring them into question. Rather Fishback has belatedly  
3 attempted to argue compliance with the "spirit" of the regulations at the same time that he has  
4 argued that they do not apply.  
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7 12. As noted above, subsequent attempts to show compliance are not relevant to whether or not  
8 the Order was properly issued in the first place.  
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10 13. Fishback's main legal argument is a misplaced reliance upon Waste Management of the  
11 Desert, Inc. v. Palm Springs Recycling Center, Inc. ("Palm Springs Case"). Fishback urged the  
12 Board Members to utilize this case to find the Debris he was using was not a solid waste and was  
13 therefore not be subject to any of the requirements, even without any attempt on his part to  
14 factually document their inapplicability. The Board Members rejected this argument for a  
15 number of reasons.  
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18 14. First, the Palm Springs Case is not controlling or relevant to this appeal. As admitted at the  
19 hearing, the Palm Springs Case involved a determination by the court as to what constituted solid  
20 waste for the purposes of determining what material was covered by a solid waste franchise  
21 agreement. As a result, that case involved an analysis of whether or not the material was solid  
22 waste based upon whether or not someone paid to have it taken away. The Palm Springs Case  
23 did not involve determining whether or not the CIWMB could establish regulatory requirements  
24 for the handling that material. Whether or not someone had to pay for the CDI debris to be taken  
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1 away is not relevant to whether or not the way that debris is handled is subject to CIWMB  
2 regulation.

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4 15. As Fishback's representative, Kelly Astor, noted, what determines whether or not the  
5 material is a solid waste is what is done with it ("a chair is not waste if used as a chair but is a  
6 waste if it's thrown out"). In adopting its CDI Disposal regulations, the CIWMB has established  
7 requirements that allow LEAs to make that determination. Fishback's argument would deny the  
8 CIWMB and the LEA the right to require information to be able to make that determination –  
9 something not even remotely considered in the Palm Springs Case. As Mr. Astor noted, if  
10 Fishback was using the Debris to create artwork, no one would claim it was disposal. Yet, that is  
11 precisely the reason the regulations need to apply. Fishback is making the final deposition of  
12 CDI debris to land (not making artwork) and the regulatory requirements are designed to enable  
13 the LEA to determine whether or not the activity is disposal or not. In upholding the Cease and  
14 Desist Order, the Board Members are not denying Fishback the right to show he is not a disposal  
15 site, they are simply requiring him to follow the rules that set forth the requirements for showing  
16 that he is not.

### 21 **Order**

22 Based upon the foregoing, the Board hereby upholds the Hearing Officer's Decision and the  
23 LEA's Cease and Desist Order, issued May 11, 2006, and orders Fishback to comply with it. The  
24 Board also orders the LEA to review any information that Fishback submits to show that his  
25 activity fits within either the Excluded or Enforcement Agency Notification Tier, and if he does,  
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1 allow compliance with the Cease and Desist Order through this lesser level of regulation (i.e. not  
2 require a solid waste facility permit).

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4 This Decision shall be effective upon service.

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7 Dated: 1/22/07

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10 Margo Reid Brown, Chair  
11 California Integrated Waste Management Board

12 cc: Members, California Integrated Waste Management Board  
13 Mark Leary, Executive Director  
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